ATTORNEY FOR APPELLANT:

MARCE GONZALEZ, JR.
Merrillville, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

GARY DAMON SECREST
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

VINCENT ANTOINE IRVING,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 45A05-0612-CR-696
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Clarence D. Murray, Judge
Cause No. 45G02-0603-FB-18

May 31, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Vincent Antoine Irving appeals the six-year sentence that was imposed following his conviction for Possession of Cocaine,[1] a class C felony. Specifically, Irving argues that the trial court improperly balanced the aggravating and mitigating circumstances and that the sentence was inappropriate in light of the nature of the offense and his character. Finding no error, we affirm the judgment of the trial court.

FACTS

On September 6, 2006, Irving pleaded guilty to one count of possession of cocaine as a class C felony. Pursuant to a written plea agreement, Irving signed a stipulated factual basis, which provided "[t]hat on or about March 16, 2006, Vincent A. Irving was at [****] Massachusetts in Gary, Lake County, Indiana. That on that date, at that location, Vincent A. Irving was in possession of 3.29 gross grams of Cocaine, . . . [he] knew cocaine was a controlled substance [and] . . . knew it was illegal to possess cocaine." Appellant's App. p. 31. The parties also agreed to an "open" sentence. Id. at 29.

At the sentencing hearing that commenced on October 16, 2006, the trial court sentenced Irving to six years of incarceration—two years below the maximum sentence, but two years above the advisory sentence for a class C felony.[2] The trial court identified

[1] Ind. Code § 35-48-4-6.

[2] Indiana Code section 35-50-2-6 provides that "A person who commits a Class C felony shall be imprisoned for a fixed term of between two (2) and eight (8) years, with the advisory sentence being four (4) years. In addition, the person may be fined not more than ten thousand dollars ($10,000)."

Irving's "horrendous" criminal history, tr. p. 22, which consisted of five felonies, as an aggravating circumstance. It was also noted that Irving was on parole when he committed the instant offense. Finally, the trial court considered Irving's admission of guilt as a mitigating factor. Irving now appeals.

DISCUSSION AND DECISION

I. Abuse of Discretion

Irving first claims that the trial court abused its discretion in imposing the six-year sentence. Specifically, Irving argues that sentence cannot stand because "the one mitigator and one aggravator should balance equally." Appellant's Br. p. 4. Put another way, Irving claims that the trial court placed too much weight on his criminal history in deciding what sentence to impose. As a result, Irving argues that "the advisory sentence of 4 years was the appropriate sentence." Id.

Notwithstanding Irving's claim, a panel of this court determined in McMahon v. State, 856 N.E.2d 743, 749 (Ind. Ct. App. 2006), that sentences will no longer be reversed "because the trial court abused its discretion by improperly finding and weighing aggravating and mitigating circumstances." More specifically, a trial court may not be found to have abused its discretion based on a sentence that is authorized by statute and permissible under the Constitution of the State of Indiana, "regardless of the presence or absence of aggravating

circumstances or mitigating circumstances." Id. (emphasis in original); see also Ind. Code § 35-38-1-7.1(d).[3] Because the review of a trial court's sentence for an abuse of discretion is no longer available, the trial court could not have erred in its consideration of Irving's criminal history.

II. Appropriateness

Irving also argues that the sentence imposed by the trial court is inappropriate in light of the nature of the offense and his character under Indiana Appellate Rule 7(B). Even if the trial court followed the appropriate procedure in arriving at its sentence, this court still maintains a constitutional power to revise a sentence it finds inappropriate. Hope v. State, 834 N.E.2d 713, 718 (Ind. Ct. App. 2005). However, this court's review under Appellate Rule 7(b) is "very deferential" to the trial court's decision. Martin v. State, 784 N.E.2d 997, 1013 (Ind. Ct. App. 2003).

Notwithstanding the above discussion regarding a trial court's alleged abuse of discretion at sentencing, we are entitled to consider, among other things, aggravating and mitigating factors found—or not found—by the trial court as we conduct an Indiana

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[3] As noted in McDonald v. State, 861 N.E.2d 1255, 1258 (Ind. Ct. App. 2007), "this court is divided on whether it is required to review aggravators and mitigators found or not found by the trial court." See Gibson v. State, 856 N.E.2d 142, 146-47 (Ind. Ct. App. 2006) (where a different panel observed that "we will assume that it is necessary to assess the accuracy of a trial court's sentence statement if the trial court issued one, according to the standards developed under the 'presumptive' sentencing system.") We agree with the pronouncement in McDonald where it was determined that "a challenge to the trial court's sentencing statement presents no issue for appellate review." Id. at 1259. While our Supreme Court has yet to explicitly decide the issue, it recently emphasized that "the amendments [to the sentencing statutes] permit a trial court to impose any sentence that is authorized by statute and permissible under the Indiana Constitution 'regardless of the presence or absence of aggravating circumstances or mitigating circumstances.'" McElroy v. State, No. 49S02-0605-CR-174, slip op. at 4 n.1 (Ind. May 2, 2007) (quoting I.C. §35-38-1-7.1(d)).

Appellate Rule 7(B) review. See, e.g., Prowell v. State, 787 N.E.2d 997, 1005 (Ind. Ct. App. 2003) (considering statutory aggravators and mitigators as part of an analysis of the character of the offender); Martin, 784 N.E.2d at 1013 (same).

In evaluating the nature of this offense, the facts of Irving's cocaine possession show no potentially aggravating circumstances. However, when examining Irving's character, the record shows that he has accumulated five prior felony convictions, including two for manufacturing a controlled substance, aggravated assault on a peace officer while using a firearm, unlawful use of a weapon by a felon, and trespass to a vehicle. Appellant's App. p. 50. Moreover, Irving has had his probation revoked once, and he committed the instant offense while on parole. Id. at 47. In essence, the record demonstrates that Irving is a recidivist with a history of drug-related offenses. Moreover, Irving has made no effort to control his drug problems. Despite repeated run-ins with the law, Irving has not been deterred from criminal conduct. Under these circumstances, we cannot say that Irving's six-year sentence was inappropriate in light of his character.

The judgment of the trial court is affirmed.

FRIEDLANDER, J., and CRONE, J., concur.